UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ARKEMA, a Pennsylvania Corporation and GENERAL METALS OF TACOMA, INC., A Washington Corporation, Plaintiffs, v. ASARCO, Inc., a New Jersey Corporation; ECHO LUMBER CO., an Oregon Corporation; GOODWIN JOHNSON (1960) LTD, a Canadian Corporation; JOHNSON-BYERS, INC., a Washington Corporation; DONALD E. ONLINE, a Washington Resident; PETROLEUM RECLAIMING SERVICE, INC., a Washington Corporation; and WEYERHAEUSER COMPANY, a Washington Corporation, Defendants,	Docket No. C05-5087RBL Tacoma, Washington March 28, 2007

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

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Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

THE CLERK: This is in Cause No. C05-5087RBL, Arkema, Inc., et al., versus Asarco, Inc., et al.

Counsel please make their appearances.

MR. MYERS: Your Honor, Mark Meyers representing plaintiff General Metals of Tacoma.

THE COURT: Good morning, Mr. Meyers.

MR. MCCARTHY: Your Honor, James McCarthy representing plaintiff Arkema, Inc.

MR. PARKINSON: Your Honor, Stephen Parkinson for plaintiff Arkema, Inc.

MR. ASHCRAFT: James Ashcraft representing General Metals.

THE COURT: Mr. Ashcraft, Good morning.

MR. COLDIRON: Mark Coldiron representing Weyerhaeuser Company.

MR. KLEIN: Keith Klein for Weyerhaeuser, Your Honor.

MS. HUGHES: Kim Hughes representing Weyerhaeuser.

THE COURT: Good morning.

MS. HALE: Jennifer Hale representing Weyerhaeuser.

THE COURT: Good morning all.

All right. There are a number of motions for summary judgment that I would like to deal with today. What I would like to do is deal with the issue of whether wood is a hazardous substance under CERCLA or MTCA first. That may inform outcomes in other motions, and we will deal with the

contribution issue last.

So my proposed order or sequence would be docket 198, Weyerhaeuser's motion for partial summary judgment, then back to the first in, first out: 193, plaintiffs' motion for partial summary judgment, then Weyerhaeuser's motion for partial summary judgment as to costs incurred at CO-12 and CO-13, and then we will finish up with the contribution protection that is being sought under MTCA by Weyerhaeuser.

I have reviewed the materials that have been submitted, and that would include the errata documents that were filed yesterday, together with Weyerhaeuser's response to plaintiffs' notice of supplemental legal authority and deposition testimony, and obviously I have looked at the plaintiffs' additional authority which was the decision written by Judge Berzon of the Ninth Circuit.

Anything that I should have reviewed that I have not?

Anything more recently filed?

MR. MYERS: Your Honor, I think that's everything.

MR. COLDIRON: It sounds complete.

THE COURT: All right. 198 is Weyerhaeuser's motion, so Mr. Coldiron.

MR. COLDIRON: Okay.

It would be helpful to start, Your Honor, with the issues of what we call undisputed facts. We believe that all sorts of things are important for consideration as undisputed facts.

Weyerhaeuser has operated the log sort yard on the Hylebos since 1971. It obtains its logs from the northwestern part of Washington and British Columbia.

Since 1978, logs have been debarked at the facility with minor trim. The raw logs are not processed. They're not a manufactured product in the sense of being manufactured. They're a raw product. They're not treated, painted, or stained or anything like that at this facility.

The raw logs are handled in the water near the ramp in the Weyerhaeuser dock, and in the process of that handling, it's undisputed that debris from the raw logs includes pieces of logs, whole logs, chunks of logs, bark, that sort of thing, as it attends to the activities of loading ships and unloading logs to the facility and back into the water and to load ships.

It's clear that in the area that they've expended costs that there is wood debris from Weyerhaeuser's TEF, and that's the subject of this motion, whether that debris in the water is indeed a hazardous substance under CERCLA.

It's also undisputed that at times upland storage, when upland storage on the TEF itself gets full and when logs and ships need to be loaded with those logs, there's temporary storage in the waterway by third parties in order to load the ships.

We believe that summary judgment is appropriate, Your

Honor, because the question of whether Weyerhaeuser has deposited wood debris in this area is a release of hazardous substance which we believe is strictly a question of law.

Liability in a contribution action is several and not joint and several. A lot of the cases cited deal with joint and several liability and the nuances that go with trying to avoid the severe nature of joint and several liability that came about in the 1986 SARA amendments to Superfund.

If I could review, point out, we don't believe that wood is a hazardous substance under all of the scenarios.

THE COURT: Let's talk -- I just want to make sure I'm clear as to the different conditions in which the wood enters the waterway.

MR. COLDIRON: Okay.

THE COURT: Or at least these are configurations that are at issue here in this motion.

There is an argument that the wood that is stored at the TEF and becomes the source of the debris in the waterway is contaminated with PAHs that are generated either at Weyerhaeuser or elsewhere. That's one argument, and creates an argument about a mixture that --

MR. COLDIRON: I've got something to bring to the court's attention on that.

THE COURT: Yes. I just want to make sure that I understand --

MR. COLDIRON: Can I address that issue?

THE COURT: Wait just a second because what I'm trying to do is make sure that I understand the constellation of forms in which wood is being considered as a hazardous substance in the context of this case.

One, I think, is wood with PAH. One is wood being, whether it's co-mixed or co-located, depending on the vernacular one chooses, with chemicals and other contaminants already in the water.

One is simply wood debris in its form and the fact that in the process of breaking down, ammonia is created or sulfites are created which are a hazardous substance.

Am I missing any other -- I just want to --

MR. COLDIRON: The only one that I would think that's in addition to those would be that the wood inherently contains those things that they --

THE COURT: I understand that's a dispute.

MR. COLDIRON: Right.

THE COURT: And that the ammonia -- Weyerhaeuser's argument is that Weyerhaeuser -- that the wood as it breaks down as a result of microbial action or critters, the critters create --

MR. COLDIRON: Right.

THE COURT: -- create the ammonia, and so there's not a release of the ammonia from the wood, but it is created, and

then you run into -- language is so critical here.

MR. COLDIRON: Yes.

THE COURT: But I saw in the Motorola case where release sort of morphed into generates or release, and I'm not sure generates is a term in the CERCLA vernacular, but clearly wood is a tweener here.

MR. COLDIRON: Right.

THE COURT: I mean, we don't have a situation where it needs to be burned, as in the Serafini case -- I think it was Serafini. There the court held that the fact that it had to be burned to create the hazardous substance broke the responsibility of the generator of that material.

You would argue that there is nothing that is released from the wood itself that would constitute a hazardous substance.

MR. COLDIRON: Yes.

THE COURT: Okay. I just wanted to make sure I understood.

MR. COLDIRON: I think I can touch on all of that.

THE COURT: All right, go ahead.

MR. COLDIRON: Let me start with something I think we all have missed that's important on this issue, the vehicular emissions that they've alleged in one spot or another impacted the logs, if I could.

THE COURT: Sure.

MR. COLDIRON: May I approach the bench with some cases?

THE COURT: You may.

More reading, good. My eyes used to work pretty well.

MR. COLDIRON: I understand. Everybody here understands.

One of the things that has developed in recent discovery is this issue, we have exhaust emissions from the vehicles, or the big motorized equipment at Weyerhaeuser, and it's acknowledged that we found some of those in some of our study of diesel emissions, whether from our or from Taylor Way, truck traffic, it is up in the air. One of the things that we didn't point out that we should have is that there is an exclusion in the definition of release -- and I believe that's on page 6, Your Honor, under section 22.

That exclusion, for the term "released," is under section (b) of that section, 22. And then there they define release broadly, as everything in CERCLA is broadly defined, and it says "but excludes" and then it goes to (b), which is emissions from the engine exhaust from the motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station.

We looked and found a few cases, not many, discussing what that exclusion means in our context here.

The Reading Company v. The City of Philadelphia, starting on page 16, under engine exhaust exception, page 16.

THE COURT: I have it.

MR. COLDIRON: Yes, sir. There they were trying to use this exclusion to say that PCB from a transformer on an air conditioning unit on a train, which is rolling stock, Congress intended it to be under that exclusion, and they talk about this engine exhaust exception to CERCLA does exclude emissions from engine exhaust from a motor vehicle, etc., and then they discuss that, down in the context of this dielectric fluid from a transformer, on page 17, "the exhaust exception illustrates Congress' intention that CERCLA liability not be imposed for 'the emissions of fluids necessary and integral to the normal operation of a vehicle.' Clearly, an emission from a railcar's transformer is not in any sense an emission" that this court finds no basis for saying that it's an engine exhaust emission. And they believe that CERCLA's language here is unclouded as to this exclusion.

The other case, the Uniroyal case, near the end of it, talks about this exclusion on page 20, on the right hand side, the second paragraph. And they're talking about various exclusions and exemptions. And it says that it also exempts emissions from engine exhaust from a motor vehicle, hence when congress wanted to except from CERCLA liability the useful commercial product or the by-product of the useful production activity it did so through an express exclusion.

And then hitting one other case, and it's really just a

parting comment in that case, and that's The Town of New Windsor v. Tesa Tuck, Inc., in the United States. On the last page, 5, and it calls this exclusion CERCLA's tailpipe emission exemption, and that's really all it says. It acknowledges it.

THE COURT: It just gives it a name.

MR. COLDIRON: It gives it a name. So it's the tailpipe exclusion.

To respond to your question, then, about the facts we have here under this exclusion that exists as to the definition of a release, plaintiffs cannot make a prima facie case on the fact that we have tailpipe emissions that are found on wood or anything else.

I would also note that in any urban area where there's industrial activity, any urban area, there's these excluded tailpipe emissions that contain PAHs. In that sense, PAHs are background, and many times they're discussed by scientists and other people as urban background, urban runoff, storm water. But you can find these everywhere. They are ubiquitous.

So our point to that is that while they may be on the logs while they sit on the yard, the exclusion prevents them from being a release. It doesn't mean they're not there, it doesn't mean they're like background, but congress did not intend to regulate them, so while they are there, and they may cause some factual issues later on in the trial, they can't be

held as -- they can't be the prima facie case on those emissions.

THE COURT: Is there an issue between an initial release and a subsequent release? For example, it comes out of the tailpipe and the congress has said tailpipe exception, we're not going to regulate the PAHs. On the other hand, when it settles on wood in a log sort yard and a decision is made to introduce that wood into the water, in a storage or transport effort, is there any argument that the initial exclusion is lost?

MR. COLDIRON: I don't believe the exclusion is ever lost.

THE COURT: Okay.

MR. COLDIRON: But it doesn't mean that you can always identify it with science. But I don't believe the exclusion ever is lost to these kind of PAHs. Sometimes under the new, what's been developed in the last ten years or so, chemical fingerprinting techniques, they can particularly pick out diesel and gasoline engines and things like that, and you can even say it is from a tailpipe.

I'm not saying as it degrades, or whatever it does, that you can always identify it, but certainly in that sense that they're alleging occurred here, it looks to us like the exclusion applies and you can't -- they can't make a prima facie case on that.

THE COURT: Okay.

MR. COLDIRON: Does that?

The next point you asked me to address was what is co-mix or co-located once it's deposited in the waterway with other chemicals.

We believe, and we said so in our brief, that the release, that you determine whether -- you determine whether it's a hazardous substance at the point of release, and at the point of release, we maintain that raw logs and the debris from it are nonhazardous materials. It's not a mixture, it doesn't contain hazardous substances, and it's released as a nonhazardous material.

Once it's in the waterway, then chemicals from sediment or whatever releases in other parts of the waterway co-locate or mix on it or cover it, then it's still, that doesn't change its nonhazardous character because it wasn't released, or at the time of release it wasn't mixed.

I'm thinking of the Asarco-Louisiana Pacific case where wood debris was scraped up on a yard and included rock and sand and slag from Asarco and taken to a landfill, and that's clearly a mixture at the time of disposal and it had hazardous substances in it from the slag. So that's certainly distinguishable from just a raw log sinking or a piece of bark sinking and creating wood debris on the bottom of the waterway.

THE COURT: But when the slag mixes with the bark at the log sort yard, does CERCLA have any say over the necessity and the standards by which a cleanup of the yard itself must be made?

Now you've got the mixture. You've got wood, you've got slag being co-located with wood debris. Not the transport to the landfill, which is a mixture at that point.

MR. COLDIRON: You wouldn't have a release under CERCLA until there's some disposal or some act of discarding, and so --

THE COURT: And the leachate --

MR. COLDIRON: -- you can manage it however you wanted to on your site, and if it doesn't leave your site and get into what we call the facility under CERCLA, then there's no issue about did you dispose of it.

Our point here is that when the logs -- when the log debris enters the waterway, it is strictly wood. And that's all it is. And it's nonhazardous, and when it comes to settling on the bottom, subsequent co-location of these other chemicals doesn't change the initial or the original character of it. It's nonhazardous when it was released in that sense.

This last one that you asked me about is pretty technically complicated. There's a lot of things said in the documentation and the motions and whatnot about EPA, and Ecology gets into the act of saying, you know, that it

produces or generates, it's hard to decide exactly what is going on. But Dr. Floyd in her affidavit makes it real clear that this is a geochemical biological process that's going on, and it goes on basically everywhere in the woods. Anywhere wood comes to be it starts decaying, and there is a microbial process that goes on, and in that process, the microbes, depending on whether it's aerobic or anaerobic or whatever the conditions are, they produce certain things that can be hazardous substances as part of their food chain. It's really their, you know, excrement that produces as they live off this stuff.

So wood provides some nitrogen and the bugs are in the saltwater, so they can produce the hydrogen sulfite and the ammonia and the phenyls and the things like that in their life cycle.

That's not -- plaintiffs try to make that a volume determinative thing. It doesn't have anything to do with volume. Anywhere these organic materials are, these bugs are, and they do their job.

We do not believe that process is covered by CERCLA. We don't think that is the -- contained or anything like that or it's not a chemical reaction, it's not like the PVC case where PVC was alleged to have vinyl chloride monomer in it and it somehow could get out. The court found it couldn't, it wasn't a hazardous substance. It's not even like that. It's not

like the mining ore cases because they contain the metals that do come out. Wood doesn't have that.

So we think that's a distinguishing point for wood and wood debris as to why it's not a hazardous substance as it decays naturally wherever it's located. In this case it was in the water.

That's as quick an answer I can make on that. It's probably more complicated than that.

THE COURT: You have emphasized the distinctions, and I'm not sure I found a case where the hazardous substance, inert though it may be, in the view of the particular defendant involved, whether it's grinding sludge or whatever. But in all of the cases I have seen, the material that ultimately -- the element that was ultimately determined to be a hazardous component part -- was hazardous, was a component part of the material itself.

And your argument is, is that wood does not contain any hazardous substances as a component part or otherwise, and that it is the breakdown of the material itself through these bugs, the microbial action, that, if at all, creates the ammonia. Although apparently there's an issue of fact as to whether or not the ammonia found in the Hylebos is associated with wood debris.

Is that correct?

MR. COLDIRON: Yes. Dr. Floyd points out she found

no, in her supplemental expert report, no exceedances due to ammonia even though there is minor amounts of it around.

THE COURT: But for purposes of this argument, we're going to assume that ammonia is created in the process of the breakdown of wood debris?

MR. COLDIRON: Yes. In other cases, you know, sometimes it produces methane. There's various things being produced by organic material decaying, it's just that our point is that unless that organic material, for whatever reason, has hazardous substances innately in it, then it shouldn't be considered a hazardous waste and decay, in the natural decay process.

THE COURT: What about the Spano case? I mean, doesn't --

MR. COLDIRON: In Gallagher v. Spano there was two of those, I think. One of them was --

THE COURT: I was thinking of Spano Building Corporation v. Wilson.

MR. COLDIRON: I believe that was the administrative hearing part of it. In the Gallagher v. Spano they talk about this wood debris and various other things that got in this housing addition and created methane gas that got into the residences, and EPA came out and looked at it and EPA examined all the material and didn't find any of it to be hazardous. We cited about four or five of those cases that actually find

wood in one form or another as not being hazardous. That's one of them.

THE COURT: But is it a true statement of law that nonhazardous materials placed in landfills that generated methane were hazardous material -- were found to be hazardous material?

MR. COLDIRON: I don't agree with that case. I don't agree with that position.

THE COURT: I always say, you know, law is nothing but common sense except in the case of employment law and environmental law. And I have lots of examples in employment law, and I probably ought to be careful in the area of environmental law. But that seemed to be one of those odd --

MR. COLDIRON: You have two Spana cases that say different things, and one of them is the Gallagher part of the case. Same set of facts. EPA examined it all and said it wasn't hazardous.

The other one was an administrative direction dealing with state law, and I think they did make that comment about methane.

But clearly, organic materials throughout the universe here we live on, you know, it has a natural process that is designed to remove it, or we, you know, we wouldn't be able to move around there would be so much of it. And it creates the forest mulch that's in the forest, things like that. It

breaks down.

And we don't believe that natural process where the bugs create something that might be considered hazardous is related to the CERCLA decision of whether something contains a hazardous substance. And it's not a chemical reaction. There are some cases on that. And it doesn't -- it doesn't fit any of those Alcan, there's five or six examples in the Alcan cases, even using milk. But they all assume there's hazardous substances with it.

THE COURT: Within it.

MR. COLDIRON: Yeah. So we have just wood, I think it's undisputed, raw logs, debris from it, that goes through the natural process, and even though EPA and ecology staffers made some statements regarding it was from the wood in fact, I don't think anybody's going to dispute that Dr. Floyd is not correct, that it's a biological process where the microbes generate it, not the wood.

THE COURT: Okay.

All right, I will give you a chance to rebut.

MR. COLDIRON: Okay.

THE COURT: I want to hear from the HH -- are you the HHCG now, or are you the --

MR. MYERS: Yes, Your Honor. I think when we're doing the cleanup we're the HHCG; here we are General Metals, but you can refer to us as however you please.

THE COURT: Last time I referred to you as witness.

MR. MYERS: Touché.

May it please the court, my name is Mark Meyers. I represent General Metals of Tacoma, one of the two plaintiffs in this action.

I'm glad that we are not talking about trees, we're not talking about logs, we're not talking about dimensional lumber, the items that are listed in Weyerhaeuser's brief. What we are talking about is wood garbage. We're talking about ground apart, we're talking about wood chips, we're talking about wood fibers in ten to fifteen-foot thick deposits along Weyerhaeuser's property that admittedly caused environmental damage and that Arkema and General Metals were required by EPA under the Superfund cleanup of Commencement Bay to spend millions of dollars cleaning up. We're trying to recover those costs from the Weyerhaeuser Company in this action.

You have raised questions, Your Honor, about the different mechanisms in which we claim that hazardous substances were part of the wood debris or wood waste that accumulated in the CO-14 area and others that were generated by the Weyerhaeuser Company.

I've got a variety of canned arguments. I'm going to dispense with those and go straight to the questions that you asked Mr. Coldiron, and I'm more than happy to answer any

other questions that you have.

I would like to start, though, by quoting from the Alcan case, one of the early CERCLA cases. And it says that, that various listed substances are naturally found in the environment, i.e., in the normal course of events, does not stand in the way of imposing liability against the generator of that substance. The corporate generator, a nonnatural person, has added to what nature has already seen fit to provide for that -- for the continued existence of various flight forms on this planet.

That's what's happened here. They've added wood waste.

THE COURT: Here's what I'm wrestling with. Right now everything you say is true, that wood debris is a problem in the Hylebos, it had to be cleaned up, and there were extensive -- there were a lot of costs incurred. And we've been through a trial to talk about all of the machinations that everybody had to go through to get it clean.

But in a contribution action, you still have to establish that the party you targeted is an owner or operator or transporter, that they deposited a hazardous substance, a release or there was a threatened release.

And language becomes very, very important, and I get the impression from the fact that there's a secret memo out there and reading all of the materials that have been created over the years with regard to the Hylebos, is that we've used

CERCLA so broadly that it gives us the authority to fix what's wrong, and we start to get sloppy in our language about what it is that is regulatable, and Weyerhaeuser is saying, wait, stop for a second. Show me a case that says an item that is not only nonhazardous in its useful form, but also doesn't have any hazardous substances within it that are released or can be threatened to be released, but that we have gone to the point now where in the breakdown of the process, the fecal material, as it were, of the bugs that feed off this stuff now become attributable to the log sort yard or the export facility or whatever.

I mean, wood, it seems to me, is one of those tweener materials right now, and I'm -- I understand the broad, the broad purposes of CERCLA and it should be liberally construed and so forth. But language, it seems to me, does matter in the statute.

MR. MYERS: Your Honor, and you're right. Back in the HCC days, when it was Arkema and General Metals with others contributing, we fought this issue. We debated with EPA in the mid to late 1990s on this exact issue because the import to us was a difference of dredging a hundred thousand cubic yards. We didn't want to do it.

EPA came forward with the full support of the Department of Ecology and said, this is a hazardous substance under CERCLA. You must address it. We are requiring you to address

it. That was EPA's formal position.

Now, what's EPA's basis for that? EPA's basis for that is, as stated in the documents that we have submitted, the Alison Hiltner EPA project manager letters and memos, all bedded through EPA management, with EPA's lawyer cc'd on every one of them, she said that, number one, wood does contain chemicals. It contains phenyls, it contains resin acids that are toxic in the marine environment.

We're not talking about wood waste in the forest. We're not talking about wood waste sitting on a concrete pad. We're talking about wood waste as it sits in saltwater, in an environment that is low in oxygen or devoid of oxygen. Those are the conditions. They have chemicals in them. That was EPA's position, one of their positions for requiring this.

Another position is that wood waste as it degrades does generate and release ammonia and sulfites, two listed CERCLA hazardous substances, and this activity occurs where the wood waste is located, which just happens to be on property owned by the Weyerhaeuser Company. There is a release of hazardous substances, of CERCLA hazardous substances from these huge wood waste piles on Weyerhaeuser's property. That is undisputed.

THE COURT: Is this a case -- Mr. Coldiron makes a point that this is a question of law that really needs to be resolved by the court, that it's ultimately a matter of

statutory and regulatory interpretation.

Is this a case, nevertheless, a situation, nevertheless, where the decision ought to be made after or as a part of the jury instruction packet on a directed verdict after the court has heard the kind of testimony, allowed cross-examination of Dr. Floyd, allowed evaluation of the other matters that you have alluded to in terms of Ms. Hiltner's and EPA's view that there are chemicals in the wood and so forth? Because obviously Weyerhaeuser's characterization of the components -- the constituent elements of wood is a little different.

MR. MYERS: That's true, Your Honor. I think from working on this issue for a number of years, I feel very strongly that EPA's position is a valid position. Certainly the Department of Ecology under different standards is -- there's no question, that's why Weyerhaeuser signed an agreed order and a consent decree and spent millions of dollars cleaning up their own wood waste in other areas under the Model Toxics Control Act. So under MTCA I think it's really clear.

Under CERCLA it is a more debatable issue, but the evidence that EPA came forward with that required our companies, our clients, to remediate, I think, clearly shows that this is, under a broad definition of hazardous substance, a CERCLA hazardous substance.

Your Honor, if you're not comfortable with the record

that's in front of you showing that this is a hazardous substance, I think it would be appropriate for you to hear the experts because the Department of Ecology and our own expert, Teresa Michelsen, who is the scientist for the Department of Ecology, says that this determination is on a case-by-case basis. It's based upon where the wood waste goes.

THE COURT: Here's my problem.

MR. MYERS: Sure.

THE COURT: I thought the weakest argument that was made in support of wood being a hazardous substance was the reference to the sediment management standards and the rulemaking authority. I mean, my guess is that the language in MTCA that allowed the determination by the director by rule to determine something was a threat to human health or the environment contemplated something that was very direct and said wood, under these circumstances, is going to be a hazardous substance when placed in, you know, and dealt with -- and not in a post hoc case-by-case basis looking through the rear view mirror.

Now we've got this, we're going to regulate it because we think it's a deleterious substance and we've got all the rule-making authority that was contemplated under MTCA, and the wood folks should have been more vigilant in dealing with the SMS standards and just the pregnancy of a future listing, as I said, on a case-by-case basis.

That argument troubled me because it didn't comport, I guess, with my understanding of what administrative rulemaking was intended to accomplish.

MR. MYERS: Your Honor, I think the best discussion of how MTCA and the SMS govern wood waste and the regulatory framework for addressing wood waste by the Department of Ecology is in the policy paper by Dave Kendall and by Dr. Michelsen. It's Exhibit S in our materials. And at pages -- I think I have this right -- I think it's pages 3 and 4 of that document, they talk about how MTCA and SMS work together to regulate wood waste.

And that's one of the reasons why Weyerhaeuser, as well as two other wood waste generating companies, signed MTCA consent decrees and MTCA agreed orders to clean up wood waste in the Hylebos Waterway.

I think the most direct answer to your question, or maybe to help you overcome the problem that you're having, is if you look at the definition of other toxic radioactive biological or deleterious substances, it specifically identifies EG organic debris.

And that, if you look also at the definition of hazardous substances under MTCA, subsection 7(e), is any substance including solid waste decomposition project -- products determined by the director by rule to present a threat to human health or the environment if released in the

environment.

Together, where you have a deleterious substance, here organic debris, that as it breaks down it depletes oxygen as it breaks down and generates ammonia, it generates sulfites, hazardous substances. That that's -- these regulations together specifically give the Department of Ecology authority under the Model Toxics Control Act to regulate it as a hazardous substance and to require clean up.

I don't think I can say that as eloquently as Mr. Kendall and Dr. Michelsen say it in their policy paper, but that's the reason why Ecology has the authority to regulate wood waste. That's why Weyerhaeuser, Manke Lumber and Louisiana Pacific, the two other Wood Debris Group parties in the 1990s, signed on an Ecology-MTCA agreed order and then an Ecology-MTCA consent decree to remediate wood waste.

THE COURT: Okay.

MR. MYERS: Now, I would like to address also this issue of wood at Weyerhaeuser containing PAHs that get into the water. Mr. Coldiron raises this issue of the tailpipe release. And in reading the definition of release, it's specifically to emissions from engine exhaust. It's not from contaminants that have got on wood product or wood fiber that gets into the waterway. It's not contaminants in storm water that are released off the Weyerhaeuser property into the Hylebos sediments.

If we're solely dealing with just releases from engine exhaust, that would be one thing. That's not what we're dealing with here. We're dealing with wood debris, wood waste, that has these engine exhaust PAHs on them, and that is the release that's getting into the environment and commingling with these other substances.

THE COURT: Now, that argument fits more closely to the definition in the statute and is an easier fit for me as I look at -- and I'm particularly concerned, obviously, with the whole ammonia-sulfide -- ammonia and sulfide creation process and the degradation of wood once it's been introduced. But clearly, if the PAH -- the two arguments that I found persuasive before coming out here was the PAH attachment to the wood. Obviously, Mr. Coldiron has given me some more reading to do about that. That seemed to be a more traditional kind of release of a mixture containing a hazardous substance justifying the denial of a motion for summary judgment.

The more realistic concern from an environmental standpoint, the more practical issue is simply the ammonia and the sulfite creation in the degradation of the wood debris, and ultimately just the sheer volume of the stuff and what it does to the cleanup of a Superfund site.

I mean, that's the real world, and we're dancing around -- we're trying to -- we're trying to develop all sorts of

arguments to reach the conclusion that wood is a hazardous substance, at least in the context of this case. But I have to say, it is not an easy fit. I mean, I feel like the ugly sister trying to try on the small shoe.

I think much of what Weyerhaeuser says, although the practical reality of where we are and how far we have come in the cleanup with Weyerhaeuser's participation, etc., etc., may belie the authenticity of their arguments. The arguments, nevertheless, ring somewhat true to me, and there is a dearth of authority that one would think, after 25 years of a lot of litigation, that there ought to be a silver bullet out there that decides this issue, and it doesn't seem to be that there is one. We're coming up with lots of innovative, creative arguments which really don't go to the heart of why we're here and don't go to the money issues. But we're looking for a book.

I say that as if I'm a participant on your side of the argument, and I'm not. I'm just, in terms of evaluating where this case is, it doesn't seem to be that there is a real clear hook for the court to hang its hat on regarding wood as a hazardous substance in this case.

MR. MYERS: Your Honor, I think that the fact that the wood did have some amount of PAHs on it that were released into the environment provides you with that hook. I think the fact that Weyerhaeuser's pilings that were in the same area

and admittedly leached creosol containing PAHs, the substance that everyone was concerned about along with the wood waste issues, creates a hook for you.

I think the fact that these substances generating ammonia and sulfites as they sit on Weyerhaeuser's property and release those to the environment, that that gives you a third hook.

THE COURT: That's the one I'm really wrestling with, I must tell you. I am going to read Reading and these other cases with regard to the tailpipe exception, and so forth. But everything that I have read from Motorola to Serafini to New Castle, all speak of the hazardous substance being some constituent element of the material that was disposed of.

MR. MYERS: In each of those --

THE COURT: I'm familiar with the issues of inert -- I mean, we wrestled with that for months and months and months and months with regard to the Asarco slag. I was involved in that to a great extent. So those issues don't trouble me too much. But the question about whether or not the hazardous substance ultimately to be released is a component part or a constituent element or whether that's even required. In Motorola, the judge did sort of -- and I don't know whether it was just sloppiness or intentional, but did, in addition to making reference to a release, indicated that generate -- and I could see where this is generating ammonia. Is that

sufficient under the statute, or was that just a slip of the tongue by the district judge in Arizona?

MR. MYERS: Your Honor, I think in those cases, those are all generator liability cases.

THE COURT: Right.

MR. MYERS: It's all somebody shipped something to someone else's property, and a chemical reaction takes place or some process happens where an allegedly inert substance produces a CERCLA hazardous substance.

Here we have Weyerhaeuser being the owner of this substantial portion of the property where this wood waste is located. They're the owner of the property where the ammonia is being generated, the sulfites are being generated, and they are being released into the environment.

As an owner, they are liable under CERCLA because there is a release of a hazardous substance. It may be from an allegedly inert natural product, but like with the landfill cases that many of us have dealt with for a long period of time in our careers, you know, the fact that the material going into the landfill may be inert doesn't mean that the landfill owner has no liability when hazardous substances are generated in the leachate.

I think that's an analogy here that applies. When Weyerhaeuser owns the property or substantial portion of the property where these huge quantities of wood waste are located

and where EPA has ordered us, ordered our companies, our clients, to spend millions of dollars remediating it because it has these substances, these are hazardous substances under CERCLA, and they are harming the marine environment.

THE COURT: Mr. Coldiron may or likely will come up and say, look, as long as we're talking about the practical real world impact of what's going on, let there be no mistake, the reason the Hylebos is being cleaned up is because there are a lot of noxious chemicals in there, and that's what triggered the cleanup of the Hylebos, and the fact that there happens to be wood debris that may add up to 20 percent of volume is, you know, the rub of green. I mean, that's -- I sense that may be what he says.

Go ahead.

MR. MYERS: I'm more than happy to address that argument, Your Honor. That's why as a lawyer representing one of the six companies in the HHCG we fought EPA on this issue. We did not want to have to dredge 100,000 cubic yards of wood waste sediment.

What EPA looked at under the record of decision is the biological activity in the top ten centimeters or top four inches of the sediment, and in these areas that are designated in the neck as wood debris sites 1, 2, and 3, there were not chemical exceedances in the top ten centimeters that EPA could require us, require the companies to clean up.

Therefore, EPA said, well, wait a minute, there's wood waste, there's these biologic failures, and under the record of decision, it's not just chemicals that EPA looks at, it's also the real impact, what's the real impact of what's going on out here. When you have biological failures in your testing, then that's showing a problem, and we're going to make you clean up the wood waste because there are these biological problems and because it generates ammonia sulfites and has chemicals in and of itself of phenyls and resin acids, you know, and so on and so forth.

THE COURT: All right.

MR. MYERS: Thank you, Your Honor.

THE COURT: Thank you very much.

Mr. Coldiron.

MR. COLDIRON: I've already fully discussed the engine exhaust discussion. I believe the exemption exclusion applies, and that's it. It doesn't change because obviously it doesn't make any sense at all. It's nonsensical if it only applies at the tailpipe and not where the material comes to rest in the environment. That wasn't the purpose of Congress. It recognized that it had 200 million Americans driving cars and trucks and they didn't want to regulate that activity through the tailpipe.

On the issue of MTCA liability, and in terms of the summary judgment, this is a focused summary judgment on the

issue of wood waste. It's not talking about creosote. There's substantial dispute about creosote. There's substantial dispute over PAHs. This has to do with just the wood debris itself. We don't think there's any genuine material facts in dispute. We don't think there's a need for the court to include in the trial a large amount of testimony and delay the trial over these issues because we think as a matter of law the court can rule on this.

The staffers in EPA, and I've been in Superfund for 24 years, sure, they say a lot of things to get you to spend money and clean stuff up. But if you look, as Dr. Ford pointed out, at all the decision documents that are in the record for these parties, not a single mention of wood debris. It's all about chemicals.

So if that was really their position, EPA could have put it there. If you look at -- in those documents. They did not.

If you look at the listings under CERCLA, wood's not there. It doesn't fit any category. It's not listed. It's simply void. And there's lots of cases, landfill cases, where there's wood associated with other hazardous substances, where even the EPA in the Gallagher case came out and said this is not hazardous.

So language is very important, I agree with the court.

In here we have a situation where there is some wood

debris, but it's not -- at the time it was disposed, it was not a hazardous substance, and we think the court should find that, and we shouldn't have to deal with that throughout this trial.

That's --

THE COURT: What would you see as the echo effect of a decision that wood debris was not a hazardous substance in this case? Answer the so what question for me.

MR. COLDIRON: Well, it has something to do with CERCLA several liability and the volumes that would be involved in that because you can't get there if that's the case, on those volumes. You take all of that out. It simplifies the CO-14 -- CO-13 and 12 issues.

There's plenty left to be disputed, don't get me wrong. They maintain our wharf pilings have created all this PAH contamination where they spent the money in front of our facility. They also maintain that this single sample, that we are going to talk about in the next motion, creates liability.

So there's plenty of issues left for the court to have to sort through. It's just that this one, just to us, doesn't seem like it should be included.

You know, Dr. Michelsen in her paper, that's not an official position of ecology. In fact, that whole determination is for this court to determine, and it is a major leap to take the sediment management standards that says

wood could be and situationally a dilatory substance. And admittedly, we signed up orders that call it a regulated substance but not a hazardous substance. It could be, and indeed could be regulated under sediment management standards, and we've said so.

THE COURT: Right.

MR. COLDIRON: We haven't admitted that it's hazardous or anything else.

But we did our job and spent a lot of money --

THE COURT: I can understand why wood debris would be a regulatable --

MR. COLDIRON: Yes.

THE COURT: -- substance.

MR. COLDIRON: For sediment.

THE COURT: But this motion --

MR. COLDIRON: But they're saying -- pardon me.

THE COURT: Go ahead.

MR. COLDIRON: They're saying passing -- by them incorporating the sediment management standards that were passed under six statutes or so, by them -- the act of just incorporating it, that was rulemaking under Section 5, and I just don't see it. If they wanted to say, believe me, that wood is a hazardous substance, the forest products industry would be in here in a minute.

You know, it's interesting, we're in Oklahoma, and in

Oklahoma petroleum is a dilatory substance and regulated nonhaz, and out here, they say wood should be.

But the plaintiffs are trying to say, oh, no, you can reach all the way back to this Superfund statute, and it -- by that reach back, anything could be. It could be sand, glass, rock. The riprap on the water. They would make the whole universe hazardous in a way, because it has to be rulemaking, and anything falls under it.

I don't think that's the intent, that's not the way you do rulemaking, and I don't think Ecology would want to do that. But I don't know what they would want to do.

But that's our position on the MTCA question.

Its listing under CERCLA is not situational. When something's a hazardous substance, it's a hazardous substance, and it stays a hazardous substance and you have to manage it. That's the message to industry when CERCLA was passed. You have to use care when you manage it because it's not normal after they've listed it.

And there are thousands of things that are listed, chemicals, and wood's not on there. And we just don't see any genuine material issue of fact that requires finding of fact, and we think it would greatly simplify the trial just to get wood out of the case.

THE COURT: Okay, thank you, Mr. Coldiron.

This one, unlike a couple of the others, I'm going to take

under advisement. I need to look at the material Mr. Coldiron has presented because I thought, when I came out here, frankly, that the PAH attached MTCA to the wood, probably met sort of the classic definition of a release of a mixture. This is new information. I will look at it and make my decision.

I'm still, frankly, concerned about whether or not biowaste created by the degradation of an organic substance makes the organic substance itself a hazardous substance. That is troublesome to me, particularly in the absence of any case law that seems to fit even by analogy.

And I do agree with Mr. Coldiron with regard to the rulemaking argument on the sediment management standards. I don't think that that's the way rulemaking was intended, for the director to be able to envelop a subject by stealth on a case-by-case basis after the fact.

It's been a long time since I took administrative law, but I have a clear recollection that notice was intended to accomplish a purpose to give the public an opportunity to comment. I guess I agree with Mr. Coldiron that the forest industry, the forest products industry would be there at the hearing in force if such a rule were contemplated.

Nevertheless, as a practical matter, I look at where we've been. It's clear to me that there are a lot of people who belief that CERCLA regulates this wood debris in the Hylebos,

and that fact is persuasive, although not ultimately determinative. It seems to me that the court has to look at the case law, the statutory language itself, and come to a reasoned opinion about whether or not wood debris in this situation, in this case, and perhaps, as Mr. Coldiron argues, in all cases, is a hazardous substance.

But I will take it under advisement and hope to get an opinion in the not -- I don't want to make promises. I've got a trial starting Monday and I'm going down to sit on the Ninth Circuit for a few days as well, so this is -- this, I think, is the most significant issue in the array of motions that have been submitted here today, and I want to make sure I look at everything thoroughly before rendering a decision.

All right. Let's move on now to plaintiffs' motion for partial summary judgment. And I guess I would ask you, Mr. Meyers, to answer the so what question in the first instance.

What does it matter whether Weyerhaeuser is named by the court at this point as a liable party under MTCA and CERCLA? You're going to present the same evidence at trial, and it's -- I guess I would say that there may be some issues of fact here that are disputed, but -- Weyerhaeuser probably wouldn't want me on the jury reaching that decision ultimately based on the material that I've seen, but again, I'm not sure you need this issue to be decided by a court and have it reviewed on appeal under a different standard than presenting

the evidence to a jury.

MR. MYERS: Your Honor, this is a legal issue that is important to get resolved, as it is in many cases, many of the cases cited to you in our brief, as well as Weyerhaeuser's brief, and the parties have found that designation of either plaintiffs or defendants as PLPs, potentially liable parties, to be important. I think the reason is twofold.

Number one, it's over a fundamental issue that Weyerhaeuser has raised in this case, and that's their claim that they're not liable. They're not a liable party. And they have stated that repeatedly, and they state that here today.

We want to get that issue resolved. I think it's important for our clients to get that issue resolved, as to whether Weyerhaeuser is liable and our case goes forward on the issue of allocation or whether we spend the court's time determining whether Weyerhaeuser falls within the categories of a liable party.

THE COURT: For example, if I say there's PLP for no other reason than the creosote pilings. How does that shorten trial by as much as 30 seconds?

MR. MYERS: Hopefully it shortens the amount of time I stand up here arguing, Your Honor, when we are at trial on opening statement and closing.

THE COURT: But you still have to make your case on

the broader issues.

MR. MYERS: Absolutely.

THE COURT: On the dollar issues.

MR. MYERS: Absolutely, Your Honor. It also, under the Model Toxics Control Act, means that we're the prevailing party. If we prevail against their claim that they're not liable, they are a liable party, and we are entitled to an award of attorneys' fees under MTCA as the prevailing party. That's a very important issue.

THE COURT: And, of course, that's an issue that's going to be front and center in the contribution claim.

MR. MYERS: Correct. Correct.

So here our motion, we have tried to style it as being very simple. Weyerhaeuser is liable under both MTCA and CERCLA because it owns property that was contaminated, that Arkema and General Metals paid to clean up. The statutes say that parties are strictly liable. Whether they polluted it or not, if you're an owner, you're strictly liable. Mr. Coldiron references several liability. The standard actually is strict liability. Allocation is based on several liability.

There are liability defenses under CERCLA and MTCA. None of them apply here. It's undisputed that Weyerhaeuser owns half of the CO-14 area where these deposits were located, chemicals and wood waste were intermingled. The Fuglevand declaration shows the area that our companies cleaned up,

spent millions of dollars cleaning up. Weyerhaeuser doesn't dispute. In fact, Mr. Coldiron here today acknowledges that they own that area and that our clients cleaned up that area, paid for the cleanup.

So they are an owner, they are an owner of a facility. Facility is broadly defined under both MTCA and CERCLA as where hazardous substances have come to be located. Plaintiffs incurred costs to clean up, they incurred those costs under an EPA administrative order. They incurred those costs under an EPA unilateral order, and they incurred those costs under an EPA consent decree, all with EPA oversight which our clients paid for.

Weyerhaeuser raises the defense that it's a nonpolluting property owner, and that defense is, number one, wrong. Number two, it's legally irrelevant. It's wrong because even their own experts admit that they are a source. They claim to be a minor source, but they are a source of PAH contaminants that were found in the sediments off their property. You have the pilings that you alluded to that Dr. Floyd admitted leached creosote, leached PAHs to the sediments that's on Weyerhaeuser's property. That's undisputed, they are a source.

It's legally irrelevant because of the recent case that we provided to you, the Department of Toxic Substance Control v. Burlington Northern out of the Ninth Circuit that says, and I

will quote: "Most notably PRP status premised on ownership of the facility does not require any involvement in the disposal of hazardous substances." If you own the property and it's contaminated and you don't qualify for a statutory defense, you are liable.

That's also decided in the Union Station Associates v. Puget Sound Energy case in the Western District of Washington where the parties said, hey, I didn't pollute. I may own it, but I didn't pollute it, and the court said that's not a relevant issue, that's not a defense to CERCLA and MTCA liability.

Weyerhaeuser raises the issue of having defenses.

Now, first, they did not affirmatively -- they did not raise these as affirmative defenses, and they are required to raise these as affirmative defenses in their answer or they are waived. And here we submit those defenses are waived.

Second, as to the substance, CERCLA defense 42 U.S.C. section 9607(b) states, quote: "There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by... an act or omission of a third party."

Here it's clear the releases were not solely by a third party. Courts that have looked at that have looked at it very

strictly. Weyerhaeuser does not qualify for this defense, even if the court finds that it has not been waived by their failure to raise it in their answer. Therefore we believe they're a liable party, they own the property that was contaminated and cleaned up by our clients. They don't have a defense. They're liable.

Thank you.

THE COURT: Thank you, Mr. Meyers.

Mr. Coldiron.

MR. COLDIRON: Your Honor, I would like to address the waiver issue in the pleadings first, and if I could --

THE COURT: I'm not going to rule that the defense is waived, so let's get to the substance.

MR. COLDIRON: Okay. Judge Bryan last month had a similar technical defense where he said, well, the pretrial order will catch all of that. And in the pleadings, there's been extensive discovery on that, and they have not said they are surprised.

THE COURT: No, we're going to deal with it.

MR. COLDIRON: All right.

THE COURT: But I must say that, you know, I'm not sure that the position taken by Weyerhaeuser on this motion passes the giggle test. I mean, you know, you've got an industrial facility there, you're on the waterway, you've got a lot of activity going on. It seems to me from all that has

happened -- and this is not an issue that has just surfaced. I mean, there are people who have been cleaning up around the TEF for some lengthy period of time. It just seems inconceivable to me that the plaintiffs will not be able to establish that Weyerhaeuser is indeed a liable party for the operations that have been there, given the fact that there are no quantitative limits imposed, primarily.

And that was not intended to be an insult.

MR. COLDIRON: No, not at all. And they may well --

THE COURT: It's a way I communicate the fact that the argument, ultimately, isn't very persuasive.

MR. COLDIRON: Okay. And they may well at trial show that to the court. We think that there is a genuine material issue of fact on whether we've had a release. Counsel admitted that issue. And we've -- and in just the engine exhaust exclusion just came to our radar screen within the last few days. Clearly, we found some PAHs in our studies on our facility. We believe those now are exempt, excluded from consideration.

We have an affidavit of Dr. Boehm, who is a world-class scientist, and he says he can't detect -- he looked at our roles on our facility, and as hard as it may believe, you can't detect it even in the consort ditch or in the storm water ditch.

THE COURT: Why aren't you a PLP just for the

pilings, the creosote pilings?

MR. COLDIRON: Well, that's disputed, but they haven't brought their motion.

THE COURT: How can you possibly dispute it?

MR. COLDIRON: But they haven't brought their motion on the issue of pilings. They brought their motion on a single storm water sample that had three PAHs in it at parts per billion levels. And in their reply, that procedurally we haven't been able to respond to as this is set up, they throw out all these other activities that they say show or you should infer means we've had a release.

I could go through each one of those, but each one of those shows that some control equipment, for instance the sludge on the site that had high PAHs, that was being disposed of off site. Every one of those -- the oily wash water, it was being disposed of off site. I mean, they have this burden to at least have a nexus of a release from our facility.

We had various controls, and at least the detection limits of instruments should be something to consider whether there's a release or not.

You know, we may not prevail on that, as to what they've asked in their motion for, but we think we have created a genuine dispute on that issue.

And we do dispute whether in the area of the cleanup there are creosotes from our pilings under our dock. We clearly do

that. The area under our dock was left as a natural attenuation area, even though they found some creosote. There's quite a few factual disputes on that issue.

THE COURT: All right.

MR. COLDIRON: So that's our point, is that on that issue we've at least maintained at this stage the court should hear evidence and then decide whether we have liability.

THE COURT: Thank you.

Mr. Meyers, briefly.

MR. MYERS: Briefly.

Dr. Floyd's second deposition, which was taken well after the briefing was done, we provided to you.

THE COURT: Right. I've read it.

MR. MYERS: That kills Weyerhaeuser in their defense. She admits PAHs are released from the pilings. PAHs from the pilings accumulated in sediment on Weyerhaeuser property. Weyerhaeuser owns the property. They are a source of the contamination. That's it.

THE COURT: I'm going to grant the motion, but I will tell you, I don't think it -- I do believe that Weyerhaeuser is a liable party, and jury instructions will include that finding by the court. I don't think it's going to change one iota the evidence that is adduced at trial and the plaintiffs' burden to persuade the jury regarding the nature and extent of the release, but it appears clear to me from the testimony of

Dr. Floyd an acknowledgment that a release has occurred. Clearly Weyerhaeuser is the owner of the facility, and the materials that have been released in detectable quantities, although very minor with respect to the creosote pilings, etc. -- or creosote pilings, I'm just going to leave it there -- are hazardous substances.

Mr. Myers.

MR. MYERS: Your Honor, just one clarification. This will be a bench trial.

THE COURT: Oh, okay.

MR. MYERS: So I don't know if you want to temper your comments or expand on them one way or another.

THE COURT: No, I'm not going to expand on them. I still want to hear the evidence then.

MR. COLDIRON: We understood it was a bench trial.

MR. MYERS: Thank you, Your Honor.

THE COURT: All right, 193. That was docket number 193.

Now we have docket 199, Weyerhaeuser's motion for partial summary judgment of costs incurred in connection with CO-12 and CO-13.

MR. KLEIN: Your Honor, Keith Klein for Weyerhaeuser.

THE COURT: Mr. Klein.

MR. KLEIN: This motion is for two areas that are separate from the one you've just ruled on. You ruled on

CO-14.

THE COURT: Right.

MR. KLEIN: We're talking about two other areas.

THE COURT: This is where Foss ties up at the Pennwalt Tie log rafts that are waiting either transshipment by loading on a ship or sending over to the Foss permanent storage area. Right?

MR. KLEIN: Exactly, Your Honor.

THE COURT: Okay.

MR. KLEIN: These are areas that are owned by Arkema, not Weyerhaeuser, so our position is that owner liability does not apply to them. And these areas -- it came to our attention that we should make this motion to carve out these areas if we possibly can and streamline the trial because Paul Fuglevand, the plaintiffs' expert, submitted an expert report allocating the response costs that the plaintiffs have incurred for only -- for these three areas, 12, 13, and 14, based on the amount of wood debris that was in these areas.

And, in fact, if you look at the opinions in Fuglevand's report, you will see that in allocating -- in doing that allocation with regard to wood volume, he expressly did not include chemicals. In fact, he derived Weyerhaeuser's percentage shares solely from wood, not chemicals.

So we thought, well, the plaintiffs are just alleging that Weyerhaeuser has released wood to these areas, so let's try

and deal with that.

Now we find in the plaintiffs' response that they're also claiming PAHs migrated down to that area. But I will deal with that in a moment.

But dealing with the wood, it was our belief that that was the only concern in that area, and that it got there from deposition from these rafts that were tied up at the Pennwalt Tie. It was not property that we owned. It was not any area that we controlled. In fact, one of our former managers didn't even know where the Pennwalt Tie was.

THE COURT: But why don't you have liability as an arranger?

MR. KLEIN: Your Honor, because the logs, when they were put into the log rafts and throughout, they remained a useful product. They were immediately destined either for shipment or, as you discussed, other storage, but ultimately for shipment, and so the useful product defense we believe still applies, even in light of the Burlington case which seems to -- plaintiffs are arguing has narrowed that useful products defense. But it does say that it applies where the leakage, in that case, was necessarily and immediately a consequence of the, I guess in that case it was shipment and a sale of the product.

THE COURT: Don't you know that, though, that a log raft inevitably is going to result in wood debris being

deposited at the base of the waterway? I mean --

MR. KLEIN: No, Your Honor, I don't think that the operators --

THE COURT: You may not, but the people who founded Weyerhaeuser Company sure as heck did know.

MR. KLEIN: I would argue the operators, they certainly didn't know that wood debris was a hazardous substance. Unlike the pesticides --

THE COURT: That's another motion, though.

MR. KLEIN: But in the Burlington case, the pesticide was viewed as -- arranger liability wouldn't apply there. It wasn't a useful product because it necessarily immediately would result in the disposal of a hazardous substance. But the operators at the TEF would not have known that wood debris would result in the disposal of a hazardous substance, nor would they necessarily have known that wood debris deposition would occur.

Now, the point I'm about to make, I fully realize is one to be saved for trial, but I do want the court to understand that at trial, we will present evidence from Dr. Floyd using bathymetry data that there hasn't been any wood debris deposition from the Weyerhaeuser log rafts being tied up at the Pennwalt Tie. All the wood in that area comes from the Dunlap yard tennants which are Arkema's lessees over the years from 1964 to 1986. And so, so why would our operators believe

that wood debris is being deposited there when we have that kind of information?

Now, I realize that's going to be a factual dispute. But it wasn't necessarily the case that taking the log rafts over there was going to result in wood debris deposition.

And on top of that, you have log rafts that in most cases have been debarked, so there isn't bark to fall off of them. And you have -- they are bundled in a manner that the logs themselves aren't going to come loose and fall off, and so it's not foreseeable. So it is a different case than what Burlington did in narrowing arranger liability, we think.

And, you know, the plaintiffs have talked about, well, CO-12, 13, 14 are just lines drawn on a map, but those are their lines, those are their areas. All boundary lines are lines drawn on a map to that extent.

We didn't conduct operations in that area. We didn't control Foss.

And, Your Honor, I would like to point out something which happened in the plaintiffs' response to this motion as well as some of the others, which is we set forth detailed numbered -- and I understand you don't have to number them -- but material facts.

If you look at the plaintiffs' response, the plaintiffs did not rebut what we said or controvert or raise a genuine issue of material fact that we control that area. We said we

didn't control it, that Foss, which is an independent company that does work for lots of other companies, made the exclusive decision whether to use the Pennwalt Tie. We never directed them to use it. That was not controverted, and so there's really no way that operator liability should attach in this case.

So you don't have owner liability, you don't have operator liability, and you don't have arranger liability, and that's why we think these areas can be carved out.

I might as well also address, what I think the plaintiffs are going to say is, well, based on Burlington, you still have owner liability.

Now, that's interesting because the plaintiffs' motion on liability was only filed on the basis of owner liability for CO-14, which is what we actually own.

We agree that if there was migration of substances released from our property, from C0-14 down to 12 or 13, we agree that that would impose liability on us. We understand that. You know, we had a facility that was a release that moved somewhere else. And the plaintiffs have in their response come back and raised that very issue, which they hadn't ever brought up in the Fuglevand allocation model as a means of defeating the motion.

But in response to that, Your Honor, I would just point out a few things regarding this migration issue, which is that

-- first of all, this is the first time the plaintiffs have ever said that. There is no document, there is not even a document from Farlow or Bornhold, their primary experts on whom they rely for that proposition, which says that Weyerhaeuser substances migrated from 14 down to 12 or 13. The best they did, as I understand it, is Farlow said that PAHs went into 14. Weyerhaeuser disputes even that because 14 is not the dock area.

THE COURT: Right.

MR. KLEIN: Bornhold said the release of creosote derived PAHs from the Weyerhaeuser wharf is a likely source of PAHs to sediments in the waterway. But he didn't say where those sediments were, and he was talking about CO-14, regardless of what they are now saying, that he was also talking about 12 or 13.

But even if you set that aside, if you look at our Daubert motions and if you look at our reply, we talk about how Farlow and Bornhold can't be used to raise a genuine issue of material fact as to migration of hazardous substances down in 12 or 13 because their opinions are fundamentally flawed. Farlow has said that the creosote in 14 was based on a flawed mathematical model. He's admitted that. And in any event, he was only talking about 14.

And then Bornhold, he only assumed that the release described by Farlow was actually occurring, and he still never

said it went to 12 or 13.

So we just don't see how it creates a genuine issue of material fact to defeat this motion.

And then we're back to -- one last thing I think I would say is we're back to, well, under Burlington can the plaintiffs say we're still liable as an owner because the whole, the whole site is a facility, and we own a part of it. And, Your Honor, I would just say, first of all, that the Burlington case was decided in the context of a government cost recovery action under Section 107(a) where liability is joint and several. This is a contribution action. It did not make a decision regarding contribution where liability is several only. Divisibility, carving out 12 and 13 is possible and should be done in this case.

And I guess maybe it depends on how you define the unit of analysis. Is a facility just Weyerhaeuser's TEF or is the whole site a facility? And if you start using that rationale of going to the whole sight as a facility, you could say that the whole Commencement Bay is Superfund site, is a facility, and everyone who deposited anything into the water in the Hylebos is liable in the Foss waterway, because it's all part of the same site. Which becomes not helpful or not useful as an analysis.

So we think RTF is the facility, not 12 and 13. They are not our facility and we're not the owner of it. Therefore,

the court should carve out and find divisibility as to those areas.

And excuse me, just one more piggyback thing to that is, even if you did following the Burlington analysis, Burlington says that apportionment or divisibility can occur if you have a reasonable basis or if you can show that the contamination is not traceable back to our facility. And in this case for all the reasons I mentioned earlier, it's not.

THE COURT: Okay. Thank you very much.

MR. MCCARTHY: Thank you, Your Honor. John McCarthy for plaintiff Arkema.

THE COURT: Mr. McCarthy.

MR. MCCARTHY: I think what I would like to talk about is the Burlington case and its applicability here, but first let me give you the bigger picture.

Mr. Klein was saying that he wants to define the site or the facility for his purposes as just the TEF, but the Burlington case speaks just to that point. Where you have a single site that has multiple property owners, there is but one facility. And as the Burlington case held, when you're an owner of a part of the facility, you're a liable party for the whole facility. And if you want to make a divisibility argument, as Weyerhaeuser has done here, the burden is very heavy.

One of the confusions that comes about in talking about

divisibility and allocation is that sometimes the court used the word "apportionment" to say apportioning liability under Section 113, and in the case of the divisibility cases where you are actually at the liability phase, they talk about apportionment or divisibility. So to try and avoid the confusion, I will use divisibility when we're talking about 107 liability.

Under section 113, which is the section of CERCLA that we use, very similar in MTCA, it's where a potentially liable party under Section 107 brings an action for contribution against another potentially liable party under Section 107. So you have to go to the 107 analysis, which is what Burlington talks about. The burden is -- and one of the few exceptions is divisibility. It's a narrow exception that is not used very often, the Burlington court and many other courts have held, and it's the burden of the defendant to prove that the contamination is in no way traceable to their property.

Now, I guess I disagree with Mr. Klein's characterization of the evidence that we presented in our papers. Dr. Bornhold, who is a renowned marine geologist and sedimentologist, performed modeling exercise on the Hylebos Waterway and found that PAHs released from the Weyerhaeuser wharf didn't migrate to C0-14. He says approximately 40 percent migrated to the neck, which is the area that our group

cleaned up, and then out towards Commencement Bay, although the majority stayed in the vicinity of the Weyerhaeuser wharf and went to the upper turning basin. So at the very least there's a disputed fact about this migration issue.

I would like to go to the generator argument. And first of all, Your Honor, if Your Honor --

THE COURT: You know, I --

MR. MACARTHY: -- believes that Burlington controls, we don't need to get into those other arguments.

THE COURT: You don't. I'm satisfied that there are a number of issues of fact here and that the court cannot, should not enter any order on divisibility at this time based on the record that's been presented to the court. And so the motion is going to be denied, and we will, I'm sure, wrestle with this issue during the trial. But the motion -- there are sufficient issues of fact here for the court to be pretty confident at this point that the motion should be granted.

MR. MACCARTHY: If I might chime in --

THE COURT: Go ahead.

MR. MACCARTHY: -- on one other issue, Your Honor.

THE COURT: All right.

MR. MACARTHY: We brought up the wood waste issue once again, and I would like to direct Your Honor's attention to those EPA memos in which, when we were first told to clean up the wood waste it was because EPA informed us that wood

waste contains phenolic substances, phenyls which are CERCLA hazardous substances, and that was the threat of release that caused them to require us to do the cleanup.

Subsequent when we did the cleanup action investigation, we found out that although there were phenyls found in the sediments, that the major issue was the generation of ammonia and sulfites. But CERCLA hazardous substances and log substances were there.

And we would also like Your Honor to know that we do plan on calling witnesses from the Department of Ecology to testify on why they believe wood is a hazardous substance under CERCLA and MTCA.

Thank you.

THE COURT: Very well.

Let me also apologize. I was looking at the -- before I came out here, I looked at the docket sheet and I stopped at the August 17th entry, which included a 15-day jury trial, as the reference point, but the subsequent order of April 13, '06, does indicate that it is a bench trial.

So I wanted to apologize for my confusion on that point earlier.

Thank you very much.

MR. MACARTHY: Thank you, Your Honor.

THE COURT: Motion for partial summary judgment as to costs incurred in CO-12 and CO-13, docket number 199, that

motion is denied.

And now we go to the motion for partial summary judgment regarding MTCA contribution protection. That docket is number 196.

MR. KLEIN: Your Honor, this motion is based on Section XX, Roman numeral 20, of a January 17th, 2001, consent decree between Ecology and the Wood Debris Group members that we attached as Exhibit A to our motion, and it is a motion brought under MTCA only for contribution protection. And the issue was whether the -- well, let me first read the sentence.

It says: "With regard to claims for contribution against the WDG member companies for matters addressed in this decree," and then Ecology grants contribution protection.

THE COURT: Uh-huh.

MR. KLEIN: So the issue is whether matters addressed include the work done by the plaintiffs, that is the subject of their contribution claim.

And when I say that, I believe this to be the case, and the plaintiffs can correct me if I'm wrong, I think the plaintiffs have focused attention on the work they did in the neck, but that the overall response costs that they had at the site does also include some study and investigation in the upper turning basin area. So it's not just an allocation of costs or a percentage of costs that came exclusively from the neck.

But in any event, we believe that the matters addressed can be determined from the four corners of the consent decree in the context of what was happening at the site, and the cases have made it clear that you would obviously not consider this in a complete vacuum, but actually the historical facts are contained within the consent decree. And so as a result it's really not necessary to consider extrinsic evidence, and extrinsic evidence can't be used to vary or change the terms of the consent decree anyway. So I'm not going to address the extrinsic evidence issues. I think those are easily answerable.

But really the simplest way to look at this is to just ask, what's the contribution protection for? It has to be for something, you know. It certainly wasn't for Weyerhaeuser to get the contribution protection against suing its own self. And it wasn't --

THE COURT: You agree that there was work done by other parties in the turning basin, correct?

MR. KLEIN: Yes, Your Honor.

THE COURT: It wasn't Weyerhaeuser alone?

MR. KLEIN: That's right.

THE COURT: Okay.

MR. KLEIN: But the other parties --

THE COURT: Even as to that area, there still would have been a logical reason to want contribution protection for

the upper -- if it were confined to the upper turning basin alone?

MR. KLEIN: Well, not from the other Wood Debris Group companies. We think the way that sentence is written, it's not talking about contribution claims among the wood companies.

THE COURT: I understand. But there was work done in that area by other than the Wood Debris Group, right? Or was it all --

MR. KLEIN: There wasn't other dredging work, there wasn't other cleanup work, is my understanding. So only the plaintiffs' possible investigation work that I was talking about. It wasn't contemplated, it wasn't within the understanding of the parties that there was going to be future work done in that upper turning basin area. It was our understanding --

THE COURT: So your argument would be that there is no reason for contribution against one's self if, if the remediation work was all done by the Wood Debris Group?

MR. KLEIN: Right.

THE COURT: There's no reason for contribution protection at all so it has to mean something.

MR. KLEIN: Something else, which includes the neck. In fact, that's the number one clue as to what the -- what "matters addressed" means is that we all knew there was going

to be work done in the neck by the HCC, or whatever their later names were.

And if the matters addressed was just restricted to the work assigned to the Wood Debris Group members, it wouldn't have any meaning.

What you see the plaintiffs saying in this case is that the matters addressed are only the affirmative work to be done by the Wood Debris Group in the upper turning basin, the work that the settling parties are required to take. And again, that has no meaning. It has to be the work that someone else is going to do that will be the subject of contribution protection.

And so to limit the matters addressed to the work to be performed and to focus on those sections as the work to be performed doesn't tell us what the contribution protection is designed for.

Now, obviously, I think it's already established that the majority of the work and the costs that the plaintiffs occurred was in the neck.

The site here within the consent decree is called the Hylebos -- the Hylebos wood debris site, the HWDS, and it's not exactly the same as the head of the Hylebos problem area, but it's similar, and it definitely encompasses the neck where the plaintiffs did the work.

And in addition -- well, the expansive definition of the

site shows that the matters addressed include the neck.

And I would like to point out that the plaintiffs have misquoted the definition of site in at least several places in their response where they said that site excludes areas where non-wood debris parties -- non-Wood Debris Group parties are cleaning up chemically contaminated sediment. What it actually says is that the HWDS includes intertidal areas except where the plaintiffs -- or where non-Wood Debris Group companies are cleaning up chemically contaminated substance. So that's just a small sliver, if anything. The subtidal areas is where the majority, if not all, of the dredging work was done as a result --

THE COURT: Why do you believe that it was necessary, in the practical sense, to exclude from the intertidal areas those areas where the HHCG was working?

MR. KLEIN: Your Honor, I'm not sure that I have an answer for that.

THE COURT: That doesn't seem logical to me.

MR. KLEIN: It doesn't seem logical, nor do we think that that should be a basis for carving out that little slice from the contribution protection.

THE COURT: I agree in terms of sentence structure, you're exactly right, that the modifier refers to -- the modifier is the intertidal area. But as a practical matter, I can't understand for the life of me why that part would be

excluded as opposed to the subtidal areas as well.

MR. KLEIN: I'm not sure I can answer that, Your Honor, but I would say, I don't want to unnecessarily use the definition of site to restrict matters addressed that is only within the site. I mean, the HWDS clearly include the intertidal areas --

THE COURT: Right.

MR. KLEIN: -- and still the matter's addressed by -- basically, in part, some of what we are saying is you can have a matter addressed even though it's excluded. You addressed it by excluding it, and then you get contribution protection because it's not work you had to do, it's work someone else had to do.

And there's a variety of provisions in this consent decree, Your Honor, that support the idea that the plaintiffs' work in the neck is a matter addressed. If you look at this statement of facts on pages 4-6 of the consent decree, it goes through the history of the chemical contamination of the waterway and it discusses areas excluded because they are highly chemically contaminated sediments, talks about how EPA is going to require the parties to deal with that kind of work.

So there was a recognition and understanding with this contemplation, and everything was foreseeable that there would be contribution claims coming from that work.

The work -- now, the plaintiffs have focused on the word "addressed" and the work to be performed where it says the work that the wood debris groups will address and what it won't address. But the use of the word "address" there is not the same as "matters addressed" in a different place. And I do want to draw that distinction.

And then when you get to other actions on page 15, in Roman numeral XVIII, it says the consent decree is limited in scope to the geographic area in Exhibit A, which is the HWDS, quote, "and to those impacted sediments that Ecology knows to be at the Site when this Decree is entered."

Those impacted sediments were not just the wood impacted sediments, those were the chemically contaminated sediments that they talk about earlier in the consent decree. It didn't say that it was -- the scope of the decree was limited to wood impacted sediment.

Then finally you get to the covenant not to sue. And first of all, let me say that under the Akzo case, I fully understand that the covenant not to sue is not dispositive of what "matters addressed" are, but contrary to what the plaintiffs said, you don't ignore it. It sheds some light on what "matters addressed" means, particularly since it follows right after the contribution protection provision, and in there it says that matters addressed, in a parenthetical, includes all matters relating to sediments with chemical

contamination at levels exceeding the values set forth in section 6(a).

Well, those are the highly contaminated, chemically contaminated sediments for which the plaintiffs are responsible.

So they've included all matters relating to sediments with the highly contaminated sediments that the plaintiffs are responsible for, and that's -- that probably should cinch the deal there, but let me also talk about the important public policy considerations. The whole purpose of giving a contribution protection is to provide an incentive to the parties to settle so the taxpayers don't have to foot the bill. You make the scope of the contribution protection broad enough to actually protect the settling party against uncertain claims. The plaintiffs' work in the neck hadn't yet been done. You reward the settling party for its doing work. And in this case, considering that the work that was done by the Wood Debris Group companies did also extend into the neck, it's even more fair to make "matters addressed" include work in the neck.

THE COURT: You also made the argument that not only did the contribution protection extend into the neck, but also that it extends into the entire Hylebos waterway by virtue of Ecology agreeing that the WDG members had no liability for wood debris or chemicals beyond the extent of the site.

That strikes me as a bridge too far, but could you address that issue?

MR. KLEIN: Well, if it strikes you that way, I would be glad to withdraw it because I don't think it's necessary for the purposes of this motion since I don't think the plaintiffs are claiming areas for response costs that go outside the neck.

THE COURT: Okay.

MR. KLEIN: And I just would like to point out that Weyerhaeuser alone spent, I think it was, about 1.8 million to do investigation work in the neck. The Wood Debris Group companies, the other ones, had a similar share.

So we did work in the neck, so the work we did was not just in the upper turning basin. So when you consider whether "matters addressed" extends to the neck, that needs to be factored in as well, along with the fact that that investigation work was done pursuant to a cleanup plan that was the subject of this earlier agreed order and then also carried over into the consent decree.

I guess another thing I would like to point out, Your Honor, is the SEPTA case, the Southeastern Pennsylvania --

THE COURT: Right.

MR. KLEIN: -- Transportation Authority case, said there was a presumption, in fact. I think it's on -- we have a quote in our page 15 of our brief. There's a presumption

that a contribution protection can extend to an entire site.

THE COURT: Right.

MR. KLEIN: And that all plays into the policy purposes behind here.

And just a couple of other things to wrap it up, Your Honor, that I would like to point out is EPA and Ecology coordinated on this consent decree, and it was EPA that ordered the work the plaintiffs did. Both of the types of work that were done, the plaintiffs' work and our work, were long-term remedial actions. So you don't have a situation where they might have done a removal many years earlier. That was what happened in the Akzo case when the court said, no, that's not a matter addressed, it's not a similar type of work.

The plaintiffs' work here had not been done at the time of the consent decree, so the timing is also important because matters addressed is more likely to apply to future demands that aren't fully -- at least the costs and the expense isn't fully known at this point, but certainly the likelihood of that kind of a claim is clearly contemplated.

And I think that's really what runs throughout the whole consent decree, that the parties clearly knew and contemplated that either the plaintiffs, or whoever, was going to do the work that the plaintiffs did would -- that that work would be done in the neck and that it was intended to make that a

matter addressed in the consent decree.

Thank you, Your Honor.

THE COURT: Thank you very much.

MR. PARKINSON: Your Honor, C. Parkinson on behalf of Arkema.

THE COURT: Mr. Parkinson.

MR. PARKINSON: I will start with the so what question since that's what you have been focusing on in the hearing today. I think there's a new so what that's emerged in today's hearing. I haven't had a chance to see any of this briefing on this tailpipe exclusion under CERCLA, but obviously there's no parallel exclusions under MTCA. So the extent we are talking about the mixing issues and the other issues you addressed earlier. You know, that --

THE COURT: And there are attorneys' fees issue.

MR. PARKINSON: And the attorneys' fees issue, that's correct.

I want to start just talking about the legal framework. I guess just to point out it's one of the few things, at least on the general level, we agree with, with Weyerhaeuser in this case, and that is that it focuses on the intent of the parties if you look at extrinsic evidence, but the extrinsic evidence does not change unambiguous terms, it just informs the court of the evaluation.

THE COURT: Right.

MR. PARKINSON: And the issue today is what does matters addressed mean in the contribution protection provision under the consent decree. And we have two lines of argument that support that that we've laid out.

The first is there's unambiguous language in the consent decree itself that demonstrates the contribution protection does not extend to the HHCG cleanup and I'm going to walk through that language.

THE COURT: You had better walk very slowly.

MR. PARKINSON: Okay.

THE COURT: Because from a contract interpretation standpoint, you know, I understand the Akzo decision, that -- where you've got a contract that defines matters addressed one paragraph away from the ultimate paragraph, I -- nothing that I read in the document itself convinced me of your argument that the four corners of the document convince a reasonable person that the intent of the parties was to exclude from contribution protection those areas that were remediated by the HHCG.

MR. PARKINSON: We will go through that.

THE COURT: Take me through very slowly.

MR. PARKINSON: I will take you through very slowly.

First, the scope of the contribution protection, and this is, I think, both sides agree, is based on the site definition. So when we go to the site definition, the first

sentence of it reads:

"The Site referred to as Hylebos Wood Debris Site ... is located at the upper reaches of the Hylebos Waterway, Tacoma, Pierce County, Washington, and includes the intertidal areas except where non-Wood Debris Group parties are cleaning up the chemically contaminated sediments."

So right in the very site definition itself, you have a clear explicit exception to the areas where non-Wood Debris Group parties are cleaning up chemically contaminated sediments.

Now, I will grant the court that this isn't the world's best constructed sentence, but I think when you look at it in light of the other clauses in this consent decree that I'm going to go through and the extrinsic evidence I'm going to go through, the clear meaning of that sentence is not meant simply to apply to this weird, random, from low tied to high tied, as the plaintiffs claim, which wasn't the focus of any of the work, there's no rational reason for that to be carved out, but to apply, in fact, to the whole sentence.

THE COURT: But wouldn't Weyerhaeuser say we didn't -- our work didn't just consist of cleaning up in the upper tidal basin, it also included studying and investigating, which included the neck, so that our work really does cover the entire site?

MR. PARKINSON: Let me address that because part of

that is the context here.

All of the investigation work was done under an agreed order that did not have contribution protection provisions. There are kind of two phases to this project.

THE COURT: Right.

MR. PARKINSON: So they went in and they did this agreed order without any contribution protection. Studied, and they came back to Ecology and they made a proposal. They said, based on our study we propose entering a consent decree to just clean up these delineated areas in the upper turning basin.

Ecology agreed to them entering that order, and so they entered an order with contribution protection. But that investigation work was done, but the consent decree that they entered addressed was clean up of the polluted areas in the upper turning basin.

I think that's what this site definition reflects, is that we're talking about the site that has been previously defined, but we're only talking about the parts that you're cleaning up. And therefore we're accepting where the non-Wood Debris Group parties are cleaning up ---

THE COURT: So work now becomes synonymous with cleaning up?

MR. PARKINSON: Work becomes synonymous with matters addressed, because it basically says here's the site that

excludes out parts that we're cleaning up, here's matters addressed. Okay, here's the work performed. That's, you know, in typical fashion where you look to for matters addressed for water work, what are you doing, and it basically says we're cleaning up these delineated areas in the upper turning basin. And, in fact, that work section referred to it as what's addressed. It says you will address this, you will not address that.

And so when you look at, you know, that historical context and the language here, it becomes really clear.

I think the other thing, and now we're kind of moving on to the extrinsic evidence, is, unlike the SEPTA case, which they like to cite, there was no allocation or even a thought of an equitable allocation that was part of this consent decree. Except, as the judge will recall, you know, the parties said, we want all of you to clean this up. One party said, no, we will just pay ten per- -- 20 percent. EPA thought that was unfair, so they said, fine, we're going to enter a consent decree with you that relieves you of all liability. We're going to go after the other party for what's left.

It's completely opposite to what happened here. What happened here is there was no equitable allocation. Instead they said, we have two different disposal methodologies. And this isn't --

(Reporter asks Mr. Parkinson to slow down.)

MR. PARKINSON: I'm sorry.

We have two different disposal approaches. The first, you know, is to do the end water disposal at the site. The second is to dispose of stuff upland.

So there was no discussion of who was liable for what. The question of where is the rational line to draw between these two cleanups so that the work that's being done by one goes to this upland disposal facility and the work that's being done by the other goes to this other site.

And in fact that's reflected in further extrinsic evidence --

(Reporter again asks Mr. Parkinson to slow down.)

MR. PARKINSON: In fact, that's further reflected in the fact that the Wood Debris Group cleanup and their costs and those types of information were provided to the allocator, because as you will recall there was an independently hired allocator for the whole waterway and EPA coordinated with them, in fact did all their cashout settlements based on the allocator's determination of the shares of the various folks.

(Reporter again asks Mr. Parkinson to slow down and to repeat.)

THE COURT: Do you need a break?

(Reporter indicates if Mr. Parkinson is going to talk as fast as he is speaking, she does.)

MR. PARKINSON: I will slow down. I apologize.

So the information about the Wood Debris Group consent decree was provided to the allocator, not as an argument on behalf of the other Wood Debris Group members, what they had done. You know, Ecology had done an equitable allocation and therefore they paid their fair share so please, you know, sign the consent decree for zero dollars and we will walk away, but acknowledging that this was a split that wasn't done on an equitable basis, it was done on a convenience basis based on the cleanup approaches.

The allocator considered that for all three parties, Weyerhaeuser, Manke, and Louisiana Pacific, provided an allocation share after having considered that information. Two of the parties stepped up to the plate and paid their cashout share, and we received the proceeds from that, and one party, Weyerhaeuser, did not.

I think if you also just look at the nature of the Wood Debris Group cleanup, you will see why it's not an equitable allocation because essentially what happened was Weyerhaeuser property was split.

You know, one of the points they make is, well, gosh, this is unfair because Louisiana Pacific and Manke received small shares. Well, that's because their whole properties were in the upper turning basin so that work was done. It was just, you know, the instant log rafting that was done in the neck

that was the basis of their residual liability.

Weyerhaeuser's is expediential higher under the allocation formula because a significant piece of their property is in the neck, so it's a little apples to orange --

THE COURT: And the neck is where the chemicals are.

MR. PARKINSON: So again, when you look at the contract itself, and again just focusing on the site definition that excludes the work that we're doing, you look at the definition of work that excludes what we're doing, you look at the extrinsic evidence that all the parties behaved like it was not meant to be an equitable allocation.

THE COURT: Let me ask you this.

MR. PARKINSON: Uh-huh.

THE COURT: Is there any reason to suggest that -- and it hasn't been argued, so I'm pretty sure I'm probably wrong, that LP and Manke paid a cashout to take care of CERCLA and MTCA liability, and so their cashout is not evidence of anything regarding their belief as to the extent to which this contribution protection under MTCA extended?

MR. PARKINSON: I think that the argument that we're making, Your Honor -- or let me back up.

What Weyerhaeuser is saying in its papers, if we understand it correctly, is that they've kind of paid their fair share and therefore they should get contribution protection from the neck.

So our response was simply that that is not the perception of the people who also signed that consent decree.

Again getting back to the intent of the parties is driving participation.

THE COURT: I think they do make a point, and I've got it in my note that they think they've paid their fair share, but that's not the -- that's not the basis, necessarily, of their contribution protection claim. They claim they've got a piece of paper that says they get contribution for matters addressed in the site, and matters addressed include not only the work that they did to clean up the upper turning basin, but also the investigative work that they did in the neck.

Do you have a reason -- why was MTCA willing to give Weyerhaeuser a covenant not to sue on the neck, with regard to the neck?

MR. PARKINSON: I think it's -- yes, I do have a response to that. I think it's, when you look at the whole record, Ecology and EPA were working together hand in hand on this. In fact, that process went back quite a ways --

THE COURT: Right.

MR. PARKINSON: -- on source control and some other issues.

So when Ecology was negotiating this consent decree, this carve out in the upper turning basin, they understood that EPA

was having a consent decree with HHCG to clean up the neck.

So I think the reason they were willing to make that covenant not to sue more broad is because they knew EPA was taking care of the other piece, you know. They didn't need two hammers; they already had one.

And that's reflected in the Akzo case as well.

THE COURT: Oddly enough, I mean, as it turned out, there were -- there used to be four or five in that group and several of them declared bankruptcy, and so it's hard for me to accept that an administrative agency with as big a club as DOE has or EPA not taking a belts and suspenders approach or a Dick Butcuss approach and grabbing the entire backfield and throwing them out until they found the one with the ball -- or the money in this case.

So I understand you can say, well, they had some level of confidence that EPA was going to take care of the neck, so they were going to let Weyerhaeuser, arguably a deep pocket with property that extends not just to the upper turning basin but to the neck as well, they are going to let them go from any direct action by DOE.

I guess the response would be, well, that didn't prevent EPA from coming after them, if in fact everybody in the HHCG went belly up.

MR. PARKINSON: And there were memorandums of understanding between EPA and Ecology about, you know,

dividing things up and dividing it up on the site. To be honest with you, I wasn't in the room when those discussions took place.

THE COURT: Right. Right. Okay.

All right. I don't have any other questions. If you've got anything you want to add, now's the time to do it.

MR. PARKINSON: Okay. No, Your Honor, unless you have questions.

THE COURT: Thanks very much.

MR. PARKINSON: Thank you.

MR. KLEIN: Your Honor, I think I can shed light on that intertidal issue that you asked about.

THE COURT: Yes.

MR. KLEIN: I think the reason for that was that the model that the agency was working with at that time was that the individual property owners around the site were going to do that intertidal cleanup themselves.

Now, that may or may not later have been the case, but that was -- at the time it was entered into, that was what was contemplated, so that's why the intertidal area could have been carved out, and that wouldn't affect the contribution protection matters addressed analysis as to the work the plaintiffs did in the subtidal area.

And frankly, it wouldn't even have affected it if the plaintiffs also had extended work later on, had been extended

to the intertidal areas.

Your Honor, the plaintiffs seemed to think that the agreed order has no relevance, but -- and that it does not generate or inform the terms of the consent decree, but there is that document which I mentioned earlier, the cleanup action plan, which is in both the agreed order and the consent decree, and so it's a transition carry-through document that required the investigative work earlier, and then it required the remedies later on.

I would like to read one sentence out of the Akzo case, which I think really cinches it, is that the rail -- it says: The rail companies agreed to take on the remedies necessary to clean up the railyard in order to resolve their liability for contamination throughout the site.

That's what the Wood Debris Group companies did. They agreed to perform these remedies that are called for in the consent decree and upper turning basin to resolve their liability, at least for MTCA contribution protection, throughout the whole site. And that was what was contemplated by the parties, and that is really the intent of the parties to the consent decree is what controls, as determined by contract interpretation, as you pointed out.

And just one final comment about the investigation costs. We would like the court to understand that that Wood Debris Group allocation that was talked about reallocated

investigation costs only. It did not -- each party paid its own costs for the work that was done in the upper turning basin.

And we don't find anything to be relevant about how LP or Manke behaved with regard to small amounts that you could regard as nuisance value in settling, you know, any sort of case, you know, considering the overall costs involved here and the amount the plaintiffs are claiming against us.

THE COURT: I know that Mankes fairly well, and I could tell you that a couple hundred thousand bucks coming from them is not nuisance value. You probably all know them as well. They had to dig deep in the backyard to come up with that money, I'm sure.

MR. KLEIN: All right, Your Honor. That's all we have.

THE COURT: I'm aware of the admonition in the Akzo case, that one should not place too much emphasis -- perhaps the plaintiffs would say any emphasis -- upon the definitions described in the covenant not to sue, and transfer that to the language in the contribution protection applicable to third parties.

I have looked at the four corners of the document trying to discern whether or not the contribution provision and protection was intended by the parties to be limited in some way to the areas where there was actual remediation by the

parties or whether it extended to the entire site or some subpart thereof.

As I have looked at the document, I have found nothing to indicate in my judgment that the contribution protection was not -- was to be limited to the specific area of the cleanup. I am told here today, not if I'm correct, that the upper turning basin, the debris removal was -- or the removal, the dredging work was done exclusively by the Wood Debris Group. Is that correct?

MR. KLEIN: Yes, Your Honor.

THE COURT: Contribution under that circumstance --

MR. PARKINSON: Your Honor, could I say something?

THE COURT: Go ahead.

MR. PARKINSON: Did the Port of Tacoma do some work ?

MS. HUGHES: No, not per se.

THE COURT: Contribution under that scenario appears to make little sense, there being no other party incurring response costs in connection with the cleanup. And I will say for the record, and for the Ninth Circuit, if this matter gets to that point, that I do find the definition of matters addressed in the covenant not to sue to be persuasive, although not dispositive. Matters addressed in the consent decree indicated that all matters relating to -- included all matters relating to sediments with chemical contamination levels exceeding the values set forth in Section 6(a) of the

decree, i.e., the highly chemically contaminated sediments.

And I looked for evidence in the document that would suggest that a different definition of matters addressed in the consent decree was intended for the covenant not to sue as opposed to the contribution protection afforded and found no evidence that the parties made any effort to draw such a distinction.

I understand that this is a boilerplate provision that is probably taken off the shelf and prepared in a -- not in the same fashion, for example, that HHCG negotiated their contract with Bean for the dredging. It is a less formal, less precise procedure.

Nevertheless, the document is a binding contract signed by parties who have authority, DOE by statute, to enter into this kind of a deal, and DOE has statutory authority to give contribution protection to people who step up and settle.

There is a fairness issue here that I think does enter in here, and I have looked to see whether or not I can discern some fundamental unfairness to providing MTCA protection here to Weyerhaeuser. It does have significant -- it has a significant impact on the issue of attorney fees, but I cannot, based on what I now know, reach a conclusion that the contribution protection afforded does not include the site, the entire site of the wood debris -- Hylebos wood debris site, HWDS, which includes the neck, and the motion for

partial summary judgment per MTCA contribution protection, docket 196, will be granted.

All right, anything further on this matter? I have under advisement the motion regarding wood as a hazardous substance. I still have your motions with regard to the experts. Frankly, it's going to be a little while before I get to those two matters just because of the crush of business and our docket.

Right now we've got seven -- I think we've got seven, now six -- one case just settled -- six civil trials in May, along with about seven or eight criminal trials. So you're currently scheduled for May 7. We've got one starting on April 30th which should be over. They've got a mediation coming up, but that one should be over in time to start yours, and yours is a priority. There are two other cases with May 7th trial dates.

So yours is the priority civil case, but I cannot say that some criminal case might not bump you, and we're going to have to be in close contact as that trial date approaches to see whether or not we've got a slot for you.

Right now, looking only at the civil cases, it looks like we should be able to start on May 7. But you need to be aware of just how clogged the docket is right now. A number of criminal cases were filed recently and their speedy trial requirement placed them in that window of May for trial dates.

Oftentimes continuances are requested by one side or the other, but right now it's a dicy proposition, and we're hopeful that we can get you out on the 7th.

Okay, anything further?

MR. PARKINSON: Just one question, Your Honor. In the amended case management order it provided for either pretrial order or a witness and exhibits lists.

THE COURT: If you think that the provisions of Local Rule 16 are going to be too burdensome, all I need, really, is the witness list and the exhibit list. And I'm going to want exhibits. Hopefully not in the number that we had in the trial just past with HHCG. But get your exhibits into booklets, try to work together to determine which ones are stipulated so we don't have to spend a lot of time authenticating documents and so forth. But witness list and exhibit list will suffice.

With all of this, I think I understand what your various allegations and contentions are, and trying to get in a room and wordsmith this stuff is harder than coming up with a consent decree. So I don't want to put you through that if I don't have to.

Mr. Coldiron.

MR. COLDIRON: When can we expect the Daubert motions to be ruled upon?

THE COURT: I'm looking -- my guess is within a

couple of weeks. I've got a trial starting -- yeah, I think we've got -- Jean, I think we've got it for --

THE CLERK: 15.

THE COURT: Did we have it for 15 days?

THE CLERK: I did. But I just wanted an update.

MR. COLDIRON: Your Honor, excuse me. Are you expecting any argument on the Daubert motions?

THE COURT: Probably not. You know, and Weyerhaeuser's new to the party, but with regard to the HHCG matter, I will tell you that there is a high probability that the motions will be denied and that I will hear the testimony. That's a bench trial, and, you know, that makes almost -- that makes motions in limine almost dead on arrival when you've got a bench trial.

I'm looking for my April date. How many days -- the August order that I had looked at 15 days as the trial schedule. Is that what you're looking at?

MR. MYERS: Yes, Your Honor.

THE COURT: Okay. All right.

MR. MYERS: That gives us all the way up to Memorial Day.

THE CLERK: More than that.

THE COURT: Oh, boy.

Yeah, there it is. It is still set for 15 days.

Anything further?

All right. We will see you on May 7.

MR. MYERS: Thank you.

(Recessed at 11:50 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Julaine V. Ryen
JULAINE V. RYEN

April 23, 2007
Date